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RANGANATHAN BOOK SYMPOSIUM SYMPOSIUM

Ranganathan Book Symposium: Part 4

Lea Wisken: Putting legal concepts into political context

LEA WISKEN — 6 April, 2016

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Surabhi Ranganathan's book on strategically created treaty conflicts is a must-read for international lawyers and International Relations scholars interested in fragmentation

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[illegible] subject-matter alone shows that Ranganathan puts legal concepts into political context. She outlines the inherent limits of international law which cannot prevent states from creating new treaties to undermine existing commitments. However, international law may constrain policy-makers by steering

them towards legal discourses, forcing them to offer legal justifications for their decisions.

Let me start by congratulating Ranganathan for the empirical richness of her book. Three detailed case studies shed new light on the way in which new treaties can be used to modify existing law. In her introduction, Ranganathan mentions six further examples of strategically created treaty conflicts. I know of no other work on treaty conflicts in international law that pins down nine concrete instances of such conflicts. The book makes a strong contribution to a literature suffering from a scarcity of real-world examples.

Yet the literature also exhibits a complete lack of comparative empirical analyses of treaty conflicts, that is, analyses comparing the outcomes of different treaty conflicts and attempting to explain variation across these outcomes. Ranganathan's book is no exception to this. Her focus lies on identifying commonalities across different treaty conflicts, but she does not take the next step to identify differences and ask how these differences affect treaty conflict outcomes. Let me briefly summarize some of Ranganathan's empirical findings in their theoretical context, and explain why I think that there remains some untapped potential that could be exploited through a more comparative approach.

Ranganathan finds two main structural commonalities across most strategically created treaty conflicts. First, they often involve attempts to challenge large multilateral treaties via small or bilateral treaties. Second, treaty membership usually overlaps only partially (AB/AC conflict). The first point explains why lawyers are deeply concerned with treaty conflicts – they potentially allow a small number

of states to undermine the most important multilateral agreements. The second point exacerbates this concern, because any attempt to forestall strategically created treaty conflicts through clear priority rules would, in the case of AB/AC conflicts, violate either states' contractual freedom or the principle of *res inter alios acta*.

Ranganathan carefully teases out the resulting dilemma in her examination of the drafting process of the Vienna Convention on the Law of Treaties (VCLT). She convincingly shows that the drafters weighed the desirability of rules to foreclose strategic conflicts against the concern that states might reject overly restrictive provisions. As far as AB/AC conflicts are concerned, the VCLT gave greater weight to considerations of political feasibility: violating either treaty triggers state responsibility, but policy-makers have the final decision which treaty to comply with. Ranganathan argues that the VCLT drafters' original aspirations were reduced to the hope that the principle of political decision would steer states towards a legal discourse, and that legal discourses would lead to more appropriate outcomes.

Ranganathan's empirical chapters give some initial insights into how far this hope is justified. She is able to confirm that, indeed, legal discourses are the prevalent form of interaction in each of her three case studies. However, and this brings us back to the missing comparative element, her case studies do not allow any conclusion as to whether or not legal discourses have any discernible effect on treaty conflict outcomes. To investigate this effect, Ranganathan could have compared the outcomes of treaty conflicts with and without strong legal discourses. Alternatively, she could have shown that only legal discourses can explain an otherwise puzzling outcome.

Instead, all three cases show strong legal discourses and the outcome of each case can be accounted for through a simple alternative explanation: in all three case studies, a coalition of powerful nations led by the United States successfully challenged a multilateral regime. The exact same outcome would have been predicted by a hard-core realist International Relations scholar denying any relevance to international law and legal discourses. The same holds true for Ranganathan's finding that amongst the nine cases mentioned in her introduction, the only one where a strategic conflict failed to have any effect was one in which a group of developing states attempted to claim sovereignty over their respective geostationary orbits, thereby challenging a regime established by the world's superpowers at the time. The only variation across her case studies that Ranganathan points to, concerns the practice of "document-rattling". However, she does not discuss why this practice varied, nor whether this difference had any practical effects.

Besides greater variation in her case studies, there is one more thing I would have really liked to see in the book: Ranganathan does not tell us what a treaty conflict is. In his foreword, James Crawford praises Ranganathan for departing from a long tradition of argument over the appropriate definition. That is deserved insofar as Ranganathan criticizes both "strict" and "liberal" definitions of treaty conflict for not paying sufficient attention to whether one treaty challenges the effective operation of another treaty. However, Ranganathan does not provide an alternative definition. As a result, the reader does not know which criteria Ranganathan is using when she evaluates whether two treaties conflict. At a closer look, the discussion of this question in each of her case studies focusses on the

correct interpretations of norms and appears perfectly compatible with the definitions Ranganathan objects to.

However, I think that Ranganathan's criticism of traditional definitions actually hits a very important spot. In the preface, Ranganathan reflects on being able to build both a strong argument in favour and against the claim that there is a conflict between the India-US nuclear deal and the Non-Proliferation Treaty. She proposes that the conflict is "less a matter of determination than perception and representation". In her discussion of the seabed mining regime, she finds that conflict is a "matter of practice, not definition". If I understand her correctly, Ranganathan is really pointing us to the following: if we are interested in whether or not one treaty *actually* impairs the operation of a different treaty, then we have to look at how relevant states interpret those treaties – irrespective of lawyers' opinions on these interpretations.

That being said, Ranganathan's discussion of the definition of treaty conflict demonstrates once more that she challenges traditional legal thought and insists on making legal concepts relevant to the real world. All in all, her book builds many bridges between international law and International Relations. She concedes a lot of ground to politics, but the very fact that she takes political considerations seriously should make International Relations scholars carefully consider, in turn, the possibility that legal discourses matter.

Lea Wisken is a PhD student at the Berlin Graduate School for Transnational Studies (BTS) and a member of the Global Governance research unit at the Wissenschaftszentrum Berlin für Sozialforschung (WZB)

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